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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 129

WILLIAM JOSEPH BRYAN,

Petitioner,

vs.

STATE OF NEVADA,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

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IN THE

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No. .....

WILLIAM JOSEPH BRYAN,

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vs.

STATE OF NEVADA,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Nevada entered in the above-entitled case on February 7, 1962.

OPINIONS BELOW.

The Supreme Court of the State of Nevada in a *Per Curiam* opinion reported in ..... Nevada, ..., which is part of the certified record herein, and is printed as Appendix I affirms the Judgment of conviction of the trial court on the basis that the question presented on appeal was moot.

JURISDICTION.

The Judgment of the Supreme Court of Nevada was entered on February 7, 1962; Petition for Rehearing was filed on February 21, 1962; and said Petition for Rehearing was denied on March 7, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257(3).

Upon argument on appeal from the Judgment of the Trial Court, Petitioner asserted reliance on the Sixth Amendment to the Constitution of the United States and the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. In affirming the conviction; the Supreme Court of the State of Nevada did not consider the Federal question on the grounds that the question was moot.

QUESTIONS PRESENTED.

I.

Whether the delay from January 26, 1960, until Jan. 30, 1961 in bringing Petitioner to trial violated the Sixth Amendment to the United States Constitution and the "due process" clause of the Fourteenth Amendment of the United States under the circumstances of the present case,

(a) where petitioner was discharged as a result of a Writ of Habeas Corpus

(b) where upon appeal the discharge was held to be erroneous and petitioner was not notified of intention to try him until nine months after remittitur had been returned

(c) where the Respondent, through the District Attorney's Office, neglected to notify Petitioner of his intention to ask for a trial date.

(d) where Petitioner made a motion to dismiss on Constitutional grounds before the commencement of the trial.

II.

Whether the payment of the fine imposed as a result of conviction rendered the question moot where the accused continues to suffer damage as a result of such conviction.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Sixth Amendment and the "due process" clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE.

I.

Procedural History of the Case.

An information was filed by the District Attorney of the County of Washoe, State of Nevada, charging Defendant and Petitioner with a violation of Section 202.050, Nevada Revised Statutes, to which information a plea of not guilty was entered. Thereafter Defendant and Petitioner filed an application for Writ of Habeas Corpus on November 4, 1959, which was granted, the bail exonerated, Petitioner released and the charges "vitiated." The District Attorney appealed to the Supreme Court of the State of Nevada in a matter entitled *Raggio v. Bryan* in which the Supreme Court of the

State of Nevada reversed the order granting Writ of Habeas Corpus on January 6, 1960, reported in 348 P. 2d 1956. Remittitur in that matter was filed in the office of the clerk in the District Court on January 26, 1960.

Thereafter a minute order of the Second Judicial Court of the State of Nevada, in and for the County of Washoe, Department 1, dated February 5, 1960, set the date of trial in the within entitled matter for February 12, 1960. Petitioner was not advised of these actions of the court. Thereafter no further action in this matter is reflected in the minute orders of said Court until a minute order of said Court dated July 22, 1960, which set the 30th of January, 1961 for trial of said matter. There is no indication in the record that Petitioner was advised to appear on July 22, 1960 for any purpose. An order of the District Court, dated the 26th day of October, 1960, was served by registered mail on the Defendant in Los Angeles, California, setting the trial for the 30th of January, 1961. Thereafter, with the knowledge but without the consent of Petitioner the trial was set over to the 12th of June, 1961. Trial was had commencing on that date.

II.

Facts Material to Question Presented.

Facts material to question presented are contained in the procedural history of the case set forth in I, above the Procedural History of the Case.

III.

Federal Question Was Raised Below in Trial Court and Before the Supreme Court of the State of Nevada.

A. In the trial court on January 12, 1962, Petitioner, through his attorney, moved the dismissal of the information relying on the Sixth Amendment and the "due process" clause of the Fourteenth Amendment of the United States Constitution as appears at pages 2-12 of the record in the case of *People v. Bryan* before the District Court of the State of Nevada. Under the rules of the Supreme Court of the State of Nevada the party prosecuting the appeal, filed a written brief and argument. In the brief and argument Petitioner specifies as his first ground of appeal that the trial court erred in refusing to dismiss on the grounds that the denial of a speedy trial violated the Sixth Amendment and the "due process" clause of the Fourteenth Amendment to the United States Constitution, the brief and argument referred to herein is part of the certified record that is filed herewith.

These grounds specifying errors were before the Supreme Court of the State of Nevada which affirmed the Judgment of conviction and denied the petition for rehearing.

ARGUMENT.

I.

Certiorari Should Be Granted in the Instant Case Because an Important Question Affecting the Rights of the Accused Under the Sixth Amendment and "Due Process" Clause of the Fourteenth Amendment of the United States Constitution Is Involved.

While it is true that the Sixth Amendment has been held not to apply to the States, the right to a speedy trial guaranteed by the Sixth Amendment has been held to be included within the "due process" clause of the Fourteenth Amendment. This doctrine has been recognized when the issue has been before the Federal Courts in consideration of Writs of Habeas Corpus.

Germany v. Hudspeth, 209 F. 2d 15;

Hastings v. McLeod, 261 F. 2d 627.

The same right was codified in the Nevada Revised Statutes, Section 178.490 which reads as follows:

> "If a defendant whose trial has not been postponed upon his application is not brought to trial at the next session of the court at which the indictment or information is triable, after the same is found or filed, the court shall order the indictment or information to be dismissed, unless good cause to the contrary be shown."

The failure of the State of Nevada, through the District Attorney of Washoe County, to bring the Petitioner to a speedy trial was a denial of a fundamental right of Petitioner recognized under the common law and in England from the very earliest time. It has been held to be absolute and unqualified.

In re Bergerow, 68 Pac. 773, 136 Cal. 293, 56 L. R. A. 582;

United States ex rel. Coleman v. Cox, 42 F. 2d 988;

State v. Milner, 149 N. E. 2d 189;

United States v. Dillon, 183 Fed. Supp. 541.

II.

Petitioner Did Not Waive His Constitutional and Statutory Protection.

There is nothing in the record to indicate that Petitioner was advised at any time before the 26th day of October, 1960, that the matter had been set for trial. This order of the District Court was served by registered mail on Petitioner in Los Angeles, California, setting the trial for the 30th day of January, 1961, one year and four days after the remittitur reversing the order granting the Petition for Writ of Habeas Corpus had been filed. To preserve Petitioner's Constitutional and Statutory protection, a motion to dismiss for failure of prosecution was made to the trial court before the commencement of the trial.

Statutes providing for discharge of the Defendant when the matter is not brought to timely trial are to be construed strictly in the interest of the accused. Section 178.490 of the Nevada Revised Statutes did not by its language place any burden upon the defendant to seek a trial.

It is not incumbent upon Petitioner either under the Nevada Statutes or the Amendments to move for trial.

United States v. Dillon, 183 Fed. Supp. 541;

People v. Prosser, 130 N. E. 2d 891, 309 N. Y. 353;

People v. Winter, 186 N. Y. S. 2d 254, 18 Misc. 2d 205;

United States v. Chase, 135 Fed. Supp. 230.

The facts in *United States v. Dillon, supra*, except for the length of time involved, represent a close parallel to the instant case. The Court there stated at page 542:

> "At the time motion was made it appeared that neither the Government counsel nor defense counsel had the full facts with respect to the reason for the numerous delays and postponements that had taken place . . ."

In distinguishing the *Dillon* case from the case of *United States v. Kaye*, 251 F. 2d 87, the Court pointed out that in the *Kaye* case no motion to dismiss because of delay was made by the Defendant at the beginning of the trial.

The Court held in the *Dillon* case that it is not the duty of Defendant to press for speedy trial under penalty of waiving his Constitutional right. It is the duty of the Public Prosecutor to bring him to trial. If he fails to do so the Defendant cannot be held to have waived his Constitutional right to a speedy trial. The Court further states at page 543:

> "A waiver of Constitutional right is not lightly inferred. It must be clearly and intentionally made. Indeed, every reasonable presumption is indulged against a waiver of fundamental rights. Cf. Glasser vs. U. S., 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680".

III.

Petitioner's Payment of Fine Imposed Does Not Make the Question Moot.

An *involuntary payment*, performance or satisfaction of a judgment, order, or decree does not affect the right to appeal or bring error.

As a general rule, the *voluntary* payment, performance, or satisfaction of a judgment, order, or decree, unless made by way of compromise or agreement in settlement of a controversy does not waive the right to appeal or bring error particularly where repayment or restitution may be enforced in case of a reversal. It may be questioned that the payment of a fine imposed is a voluntary payment.

4 C. J. S., Section 314a;

4 C. J. S., Section 214b;

Reitano v. Yankwich, 237 P. 2d 521, 38 Cal. 2d 1;

Preluzsky v. Pacific Co-Op Cafeteria, 232 Pac. 970, 195 Cal. 290;

Haddad v. Pazar, 320 P. 2d 207, 156 Cal. App. 2d 695;

Lott v. Davis, 104 N. E. 199, 262 Ill. 148.

In the case of *Lott v. Davis, supra*, the Supreme Court of the State of Illinois said at page 200:

> "It is not material whether the Plaintiff can recover the money paid or not since the erroneous Judgment is of itself an injury from which the law may presume damages." Citing *Page v. People*, 99 Ill. 418.

The above citations refer to the rule in civil actions. It is obvious that with respect to the damages result-

ing from an erroneous criminal Judgment the arguments have greater force.

While it is true that there is authority holding that the voluntary payment of a Judgment acts as a waiver of the right to appeal or bring error this does not seem to be the better rule nor is it supported by the weight of authority.

State v. Pray, 94 Pac. 218, 30 Nev. 206, approved in *State v. Cohen,* 201 Pac. 1027, 45 Nev. 266, decided in 1921, represents the view of the minorty of the jurisdictions and should not be held a bar to the re-establishment of Petitioner's reputation which was impaired as a result of the denial of a fundamental Constitutional and Statutory right.

In a more recent Nevada case, *Young Investment Co. v. Reno Club,* 208 P. 2d 297, the Court said:

> "The rule is well established that while a Judgment, if affirmed, may not be enforced by reason of change of circumstances, pending appeal, yet, the subject matter is not moot for the Judgment, if left unreversed, precludes the parties against whom it stands as to a fact vital to his rights."

Petitioner is a physician. The odium which attaches as a result of the conviction is a punishment more severe than that resulting from an imposition of a fine. Petitioner, as a result of an improper refusal to dismiss the action, has suffered and continues to suffer, great personal damages as a result of the besmirchment of his professional character.

A conviction, unreversed, imposes continuing penalties beyond those specified in the statute. The stain remains, and the fundamental questions pertaining to

its removal can never become moot. Petitioner is not concerned in the instant case with the problem of recovery of the fine paid as a result of an erroneous judgment. He is concerned with the recovery of his reputation. This Honorable Court may well take notice of a truth generally accepted in our culture that to rob a man of his character is a greater wrong than to rob a man of his property. In justice it cannot be said to a man convicted "Your conviction may have resulted from a denial of a fundamental right, the intangible penalties continue, but you have no redress."

Therefore Petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of the State of Nevada, to the end that the judgment of said court may be reviewed and reversed by this Honorable Court.

ROBERT W. STANLEY,
Attorney for Petitioner.

APPENDIX I.

Opinion.

In the Supreme Court of the State of Nevada.

William Joseph Bryan, Jr., Appellant, v. State of Nevada, Respondent. No. 4468.

[Filed February 7, 1962]

Appeal from the Second Judicial District Court, Washoe County; Grant L. Bowen, Judge.

On motion to dismiss appeal. Motion granted.

Harry E. Claiborne, of Las Vegas, and *Matthews and Stanley*, of Los Angeles, California, for Appellant.

Roger D. Foley, Attorney General, *William J. Raggio*, District Attorney, *Herbert F. Ahlswede*, Deputy District Attorney, and *Drake DeLanoy*, Deputy District Attorney, Washoe County, for Respondent.

Per Curiam:

Pursuant to a judgment convicting him of the crime of furnishing liquor to a minor, a gross misdemeanor, appellant was sentenced to pay a fine of $1,000. At the time of the rendition of sentence he paid the fine in open court and was discharged from custody.

Appeal is taken from the judgment of conviction and from the order denying a new trial.

The State has moved to dismiss the appeal upon the ground that appellant having satisifed fully the judgment against him has lost the right to appeal.

In State v. Pray, 30 Nev. 206, 94 P. 218, a stronger situation was presented to this court in that Pray paid his fine under protest and under stipulation that such fine be held by the clerk, and should not prejudice his right to appeal. We held however that where one con-

victed of a crime has paid his fine, since the money could not be returned to him, and no effective relief could be granted in the event of a reversal of the judgment, the appeal must be dismissed.

Appellant acknowledges such holding, but calls attention to the fact that a conflict existed among the authorities whether a voluntary satisfaction of a judgment precluded the right of appeal. In that case we recognized such conflict but dismissed the appeal in accordance with the decided weight of authority. Appellant, in effect, asks us to reconsider the Pray case, decided in 1908, and arrive at a different conclusion. In State v. Cohen, 45 Nev. 266, 201 P. 1027, decided in 1921, we approved State v. Pray, and repeated: "While there are cases to the contrary, the weight of authority is to the effect that an appeal or writ of error will be dismissed when there has been a voluntary payment by the defendant of the fine imposed. * * * Appellant's opportunity to relieve himself of any odium that may have attached to his name on account of his conviction was lost by his failure to avail himself of the procedure provided for staying execution of judgment, pending an appeal."

We see no reason at this time for not adhering to the rule so established in this state.

Appeal dismissed.

Badt, *C. J.*
McNamee, *J.*
Thompson, *J.*

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OCTOBER TERM, 1962

No. 129

WILLIAM JOSEPH BRYAN, *Petitioner*,

vs.

STATE OF NEVADA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 984

WILLIAM JOSEPH BRYAN, *Petitioner*,

vs.

STATE OF NEVADA, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In the Supreme Court

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OCTOBER TERM, 1961

No. 984

WILLIAM JOSEPH BRYAN, *Petitioner,*

vs.

STATE OF NEVADA, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioner seeks a Writ of Certiorari to review the order of the Supreme Court of Nevada, dismissing his appeal.

OPINION BELOW

The Supreme Court of Nevada in an opinion filed February 7, 1962, and reported at 78 Nev. 38, 368 P.2d 672, dismissed the appeal of the petitio er and in an order filed March 7, 1962 denied a rehearing on the dismissal of the appeal.

QUESTIONS PRESENTED FOR REVIEW

I

Did the delay in bringing petitioner to trial, where the delay was consented to by petitioner's attorney and not objected to by

petitioner, violate the provisions of the Sixth and Fourteenth Amendments to the United States Constitution concerning an accused's right to a speedy trial?

II

Did the Nevada Supreme Court deny the petitioner any right, privilege or immunity claimed under the United States Constitution, treaties or statutes, by dismissing his appeal of a state court conviction for the reason that petitioner failed to comply with the state court procedures for taking his appeal?

REASONS FOR DENYING THE WRIT AND ARGUMENT AMPLIFYING SAME

I

DEFENDANT WAIVED HIS RIGHT TO THE CONSTITUTIONAL GUARANTEE OF A SPEEDY TRIAL BY CONSENTING TO THE DELAY AND FAILING TO ASSERT HIS RIGHT.

The defendant, through his attorney, consented to all delays and continuances and concurred in and did not object to the trial dates set by the Court, and in doing so, waived any objection to the delay in bringing him to trial. (Affidavit of William J. Raggio, pages 93, 94, 95, Vol. I, Record on Appeal.) Further, the defendant made no application to the Court for an earlier trial setting and thereby again waived his right to a speedy trial. Campondonico v. U. S. 222 F.2d 310, Certiorari denied, 350 U.S. 831.

II

THE UNITED STATES SUPREME COURT WILL NOT REVIEW THE DECISIONS OF STATE COURTS AS TO QUESTIONS OF STATE PRACTICES OR PROCEDURES.

The decision of the Nevada Supreme Court that the appeal was moot is a matter of state court practice and procedure. Ordinarily the United States Supreme Court will not review the decisions of state courts as to questions of state practice or procedure. 36 C.J.S. Federal Courts 269; Bute v. Illinois, 333 U.S. 640.

In Bute v. Illinois 333 U.S. 640, the court observed, "The present case, on the other hand, illustrates equally well the kind of judgments by a state court that should not be invalidated as lacking in the due process of law required by the Fourteenth Amendment. This is so, although the procedure followed, in 1938, by the state court in the instant cases, as to counsel for the accused might not have satisfied the practice then required of a federal court in the case of comparable federal crimes. The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases. It says merely 'nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.' This *due* process is not an equivalent for the process of the federal courts or for the process of any particular state. It has reference rather to a standard of process that may cover many varieties of processes that are expressive of differing combinations of historical or modern, local or other juridical standards, provided they do not conflict with the 'fundamental principles of liberty and justice which lie at the base of all our civil and political

institutions * * *.' Hebert v. Louisiana, supra (272 U.S. at p. 316, 71 L.Ed. 272, 47 S.Ct. 103, 48 A.L.R. 1102). This clause in the Fourteenth Amendment leaves room for much of the freedom which, under the Constitution of the United States and in accordance with its purposes, was originally reserved to the states for their exercise of their own police powers and for their control over the procedure to be followed in criminal trials in their respective courts. It recognizes that differences arise naturally between the procedures in the state courts and those in the federal courts."

The petitioner was not denied an opportunity to appeal his conviction to the Nevada Supreme Court if he had followed the proper procedure. Such procedure would have been to obtain a stay of execution and take his appeal to the Nevada Supreme Court. Instead, petitioner elected to ignore the procedure established in the State of Nevada, and now alleges a violation of his right, guaranteed by the Fourteenth Amendment to the United States Constitution.

The practice and procedure followed by the Nevada Supreme Court does not close the door to any consideration of a claim of denial of a state or federal right. The petitioner closed the door himself when he elected to ignore the established practice and procedure in Nevada.

The State of Nevada has the right to determine under what circumstances and under what conditions an appeal of a criminal conviction may be had. Due process does not require a state to afford any appellate review of a criminal conviction. McKane v. Durston, 153 U.S. 684. It has long been recognized by this Court that the right of review in an appellate court is purely a matter of state concern. Kohl v. Lehlback, 160 U.S. 293.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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